Bayer (M) Sdn Bhd v Rugayah bte Parman

COURT OF APPEAL (KUALA LUMPUR) — CIVIL SUIT NO: W-04-62 OF 1996

GOPAL SRI RAM, DENIS ONG AND HAIDAR JJCA

20 MARCH 2000

Administrative Law *— Remedies — Certiorari — Application for — Jurisdiction — Whether Industrial Court committed Anisminic error or went outside pleaded issues*

The appellant appealed against the decision of the judge in the High Court declining to grant certiorari to quash an award of the Industrial Court granting relief to the respondent. The appelant contended that the award was jurisdictionally flawed and that the learned High Court judge ought to have quashed it.

Held, dismissing the appeal:

The High Court judge had carefully directed himself on the law he was required to apply and was entirely right in refusing to interfere with the award of the Industrial Court. The Industrial Court had not commited any jurisdictional error in the wider *Anisminic* sense, nor did it go outside the pleaded issues, and its findings upon the issue of whether the respondent had been dismissed without just cause or excuse were based upon the facts it perceived founded upon the testimony it believed (see pp 93H–94C).

[Bahasa Malaysia summary

Perayu telah membuat rayuan terhadap keputusan hakim di Mahkamah Tinggi yang enggan memberikan certiorari untuk membatalkan suatu award Mahkamah Perusahaan yang telah memberikan relif kepada responden. Perayu menegaskan bahawa award tersebut cacat dari segi bidang kuasa dan bahawa hakim Mahakamah Tinggi yang arif tersebut sepatutnya membatalkannya.

Diputuskan, menolak rayuan tersebut:

Hakim Mahkamah Tinggi telah dengan teliti mengarah diri beliau tentang undang-undang yang beliau dikehendaki memakai dan betul sepenuhnya dalam keengganan beliau tidak campur tangan dengan award Mahkamah Perusahaan tersebut. Mahkamah Perusahaan tidak melakukan apa-apa kesalahan bidang kuasa dalam erti kata *Anisminic* yang lebih luas, mahupun telah terkeluar daripada isu-isu yang diplidkan, dan penemuan-penemuannya tentang isu sama ada responden telah ditolak tanpa sebab atau alasan munasabah adalah berdasarkan fakta-fakta yang ia nampak yang ditemui berdasarkan testimoni yang ia percayai (lihat ms 93H–94C).]

Notes

For cases on certiorari generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 135–306.

Cases referred to

Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)

William Jacks & Co (M) Sdn Bhd v S Balasingam [1997] 3 AMR 2585 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20

Appeal from: Originating Motion No R2–25–122 of 1995 (High Court, Kuala Lumpur)

TM Varughese (*TM Varughese & Co*) for the appellant.

LG Seah (*Lobo & Associates*) for the respondent.

Gopal Sri Ram JCA (delivering oral judgment of the court): The complaint in this appeal is that certiorari was wrongly declined by the learned judge in the court below to quash an award of the Industrial Court granting relief to the respondent. The factual matrix relating to this appeal is as follows.

At all material times, the respondent was employed by the appellant as a computer programmer. She commenced employment on 1 December 1986.

The respondent's case in the Industrial Court was that she had been progressively deprived of work over a period of time and marginalized in her employment. According to her, there came a time when she really had nothing to do. To add insult to injury, she was prevented from having access to the programming room and her computer ruler was taken away from her.

Finding herself having no work to do, she employed her time reading the Holy Quran. This appears to have irked the appellant. By a letter dated 4 December 1991, the respondent was asked to show cause as to why she was not doing any work but was instead reading a book. According to this letter, the acts of the respondent amounted to insubordination. The respondent replied by letter dated 11 December 1991. In that letter she raised a number of matters in respect of which she expressed her unhappiness. She concluded in the following terms:

> Under these circumstances, unless the company rectify matter and give me my normal work as programmer by 20 December 1991, I will have no alternative but to consider myself dismissed by the company with effect from 21 December 1991.

The appellant's response was contained in a letter dated 13 December 1991. It is an important document. For that reason we will reproduce it in its essential contents. This is what it says:

> We refer to our memo of 4 December 1991, requiring you to furnish an explanation in writing with regards to your misconduct committed on 13 November 1991 in the EDP office.
>
> Your letter of reply dated 11 December 1991 to Mr K Herzer not only failed to give an explanation for your misconduct as required but also showed no remorse for the wrong committed. The company views your threat to leave your service with the company by 21 December 1991 as an attempt to leave your service without giving proper notice to the company.
>
> Under such circumstances, the company shall proceed to institute disciplinary proceedings against you. A domestic inquiry will be held on you on 23 December 1991 at 10.00 am in the office meeting room. The charges against you are shown on the charge sheet attached herewith. You are required to attend the inquiry to answer the charges. You may call witnesses and produce other evidence to defend yourself. However, should you fail to be present, the inquiry shall proceed in your absence.

Pausing for a moment, it is of interest to note, and this was drawn to the attention of counsel by Haidar J during argument, that this letter does not purport to be a reply to the complaint raised in the respondent's earlier letter of 11 December 1991. The respondent faced with the ultimatum given by the appellant to face disciplinary proceedings made good her word. She left the appellant on 13 December 1991. She then lodged a complaint with the Director General of Industrial Relations and set in motion the procedure prescribed by s 20 of the Industrial Relations Act 1967.

Eventually the dispute between the appellant and respondent was referred by the honourable Minister to the Industrial Court. After a hearing lasting several days, the Industrial Court found for the respondent. It held that she had been constructively dismissed from her employment. Surprisingly, it found the respondent to have contributed to the events that led to her dismissal. However, there was neither a cross appeal nor a cross application by the respondent to have that part of the award corrected. Although Ms Seah for the respondent contended that it was open for us now put the matter right, we would respectfully decline to do so on the ground this is not an appropriate case for intervention. All that therefore remains before us, is the appellant's complaint that the award was jurisdictionally flawed and that the learned High Court judge ought to have quashed it.

We have very recently in the case of *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 dealt with what amounts to a constructive dismissal. We do not propose to repeat what we there said. Suffice to say in the instant case, the findings of the Industrial Court upon the issue of whether the respondent had been dismissed without just cause or excuse were based upon the facts it perceived founded upon testimony it believed. We have repeatedly said that judicial review proceedings ought not be used as a cloak to exercise appellate powers: see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 AMR 2585.

We have harkened to the submission urged on us by Mr TM Varughese, of counsel for the appellant. We have according to his advice subjected the judgment to careful scrutiny. So too the award. Having done so, we are entirely satisfied that the Industrial Court did not commit any jurisdictional error in the wider *Animisnic* sense. See *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317. Nor did it go outside the pleaded issues. We particularly dissent from the arguments of Mr Varughese that this is a case where the Industrial Court decided on issues not raised in the pleadings before it. As we have said, it did not.

The learned judge carefully directed himself on the law he was required to apply to the application before him. In our judgment, he was entirely right in refusing to interfere with the award of the Industrial Court. We think that this appeal is really quite hopeless. It must be dismissed. The appellant will pay the costs of this appeal. The deposit shall be paid to the respondent to account of her taxed costs.

Appeal dismissed.

Reported by Joel Ng